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No. 01-1692

In the Supreme Court of the United States

MIDWEST GAS USERS' ASSOCIATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

During the 1990s, the Federal Energy Regulatory Commission (FERC) ordered natural gas producers to refund to interstate natural gas pipelines certain charges that the producers had collected based upon their payment of *ad valorem* taxes to the State of Kansas. FERC required interstate pipelines that received refunds to pass the refunds through to their customers, including local distribution companies. The question in this case is whether, under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, and the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*, FERC should have compelled local distribution companies that received refund distributions to pass their recoveries through to their retail customers.

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OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 33a-35a) is unreported. The orders of the Federal Energy Regulatory Commission (Pet. App. 1a-22a, 23a-32a) are reported at 95 F.E.R.C. ¶ 61,055 and 95 F.E.R.C. ¶ 61,366.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2001. A petition for rehearing was denied on February 15, 2002 (Pet. App. 36a-39a). The petition for a writ of certiorari was filed on May 15, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1(b) of the Natural Gas Act (NGA), 15 U.S.C. 717(b), asserts federal regulatory jurisdiction over the transportation of natural gas in interstate commerce, the sale of such gas for resale, and persons who engage in such transportation or sale. Section 1(b) further provides, however, that federal jurisdiction does not apply to, *inter alia*, "any other transportation or sale of natural gas or to the local distribution of natural gas." 15 U.S.C. 717(b).

Until 1978, the Federal Energy Regulatory Commission (FERC) regulated all sales of natural gas in interstate commerce for resale, "whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company." *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682 (1954). The Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.*, however, generally exempted "first sales" of natural gas from regulation under the NGA.[1] 15 U.S.C. 3431(a)(1)(A). The NGPA imposed gradually escalating price ceilings on first sales of gas, while providing for the eventual elimination of those ceilings for certain categories of gas. See 15 U.S.C. 3311-3320 (1982).

2. In 1996, the United States Court of Appeals for the District of Columbia Circuit affirmed administrative orders in which FERC ruled that the NGPA did not permit natural gas producers to recover the costs of paying *ad valorem* taxes to the State of Kansas, to the extent that such recoveries caused the sales price of

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[1] The NGPA's definition of "first sale," 15 U.S.C. 3301(21), includes sales at the wellhead, but excludes any sale by a pipeline or local distribution company of gas that did not come from the seller's own production.

natural gas to exceed NGPA price ceilings. *Public Serv. Co. of Colo. (Public Service)* v. *FERC*, 91 F.3d 1478, 1482-1486 (D.C. Cir. 1996), cert. denied, 520 U.S. 1224 (1997). The court of appeals held that the producers' liability for FERC-ordered refunds extended back as far as gas produced in October 1983. *Id.* at 1488-1491.

In April 2001, FERC approved a settlement that partially implemented its refund orders and the *Public Service* decision. Pet. App. 1a-22a. Under the settlement, participating producers agreed to refund certain *ad valorem* overcharges to Williams Gas Pipelines Central, Inc. (Williams), an interstate natural gas pipeline. *Id.* at 1a-2a, 9a-10a. Williams agreed to distribute approximately 85% of the refunds it received from the producers to its sales customers in Kansas. The settlement allowed Williams to retain a portion of the remaining refund amount, and Williams agreed to distribute the balance of its refunds to its customers in other States. *Id.* at 11a, 31a; see Pet. 6.

3. Petitioner is an association of commercial and industrial gas users. Pet. iv. Petitioner's members purchased gas at retail from Kansas local distribution companies (LDCs) that bought gas from Williams and are entitled to distributions of refund amounts Williams received under the settlement. Pet. App. 27a-28a. Petitioner objected to the Williams settlement during FERC's approval proceeding, arguing that the Stipulated Settlement Agreement did not require the LDCs to make a sufficient distribution to petitioner's members and that FERC should require Williams to make its payments to LDCs in trust for the LDCs' retail customers or, alternatively, that FERC should require Williams to distribute refund amounts directly to the LDCs' retail customers. *Id.* at 13a-14a; see *id.* at 28a-

29a. In its order approving the settlement, FERC rejected petitioner's objection. *Id.* at 21a. FERC explained that, as it had held in earlier decisions, "the distribution of refunds by an LDC [to its customers] is a matter within the purview of state and local regulatory authorities." *Ibid.* (citing *Northern Natural Gas Co.*, 93 F.E.R.C. ¶ 61,311 (2000); *Colorado Interstate Gas Co.*, 93 F.E.R.C. ¶ 61,185 (2000); *Columbia Gas Transmission Corp.*, 31 F.E.R.C. ¶ 61,307, at 61,686 n.38 (1985)).

In June 2001, FERC denied petitioner's request for rehearing. Pet. App. 23a. FERC noted that its orders requiring producers who recovered the costs of Kansas *ad valorem* taxes to pay refunds to interstate pipelines, also required the pipelines to pass through the refunds "to the '*customers who overpaid the pipelines.*'" Pet. App. 31a (quoting *Colorado Interstate Gas Co.*, 65 F.E.R.C. ¶ 61,292, at 62,374 (1993)) (emphasis added). FERC explained that, in the context of the Williams settlement, the "customers who overpaid the pipelines" are customers who purchased the gas from Williams. *Ibid.* Furthermore, FERC continued, there had never been a judicial order requiring FERC to mandate that the producers' refunds be directed to ultimate consumers of gas. *Ibid.* FERC additionally concluded that the issue of how refunds received by LDCs should be allocated to the LDCs' retail customers involves the rates charged by local distribution companies to their retail customers and, therefore, is "within the purview of state and local regulatory bodies." *Id.* at 31a-32a.

4. The court of appeals affirmed in an unpublished per curiam order. Pet. App. 33a-35a. The court determined that it was "clear" that neither the NGA nor the NGPA authorizes FERC "to require the pass through of the Kansas *ad valorem* tax refunds to the ultimate

consumers of natural gas." *Id.* at 34a-35a (citing *FERC* v. *Martin Exploration Mgmt. Co.*, 486 U.S. 204, 207 (1988), and *Panhandle E. Pipeline Co.* v. *Public Serv. Comm'n of Ind.*, 332 U.S. 507, 516-517 (1947)). Petitioner filed petitions for rehearing and rehearing en banc, which the court of appeals denied. *Id.* at 36a-39a.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review therefore is not warranted.

1. Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), expressly disclaims federal jurisdiction over "the local distribution of natural gas." Section 1(b) also excludes from federal regulation under the NGA final retail sales of gas to ultimate consumers. See, *e.g.*, *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972) ("[T]he Act's application to 'sales' is limited to sales of interstate gas for resale."). Petitioner, however, contends (Pet. 10-11, 16-18) that provisions of the Natural Gas Policy Act manifest an intent by Congress to require FERC to approve the allocation of refunds of NGPA overcharges between local distribution companies and their retail customers. The NGPA does not establish such a requirement.

Section 601(a) of the NGPA, 15 U.S.C. 3431(a), establishes specific exceptions to the NGA's general jurisdictional rules, none of which terminates state regulatory authority over final retail sales of gas. Petitioner nevertheless argues (Pet. 17) that Sections 601(b) and (c) of the NGPA, 15 U.S.C. 3431(b) and (c), give FERC "a pervasive role in establishing natural gas pricing and assuring that [NGPA] pricing [i]s properly passed through to the retail level." Petitioner reasons (Pet. 16-

18) that Congress therefore must have intended to require FERC to ensure that LDCs pass through to ultimate retail customers any refund distributions the LDCs might receive as a result of violations of the NGPA's price ceilings for first sales of gas.

The pricing provisions of Sections 601(b) and (c)—upon which petitioner bases its argument—apply only "[f]or purposes of sections 4 and 5 of the Natural Gas Act," 15 U.S.C. 717c, 717d. 15 U.S.C. 3431(b) and (c). Sections 4 and 5 of the NGA address rates and charges for transportation or sales of gas that are *subject to FERC's jurisdiction.* See 15 U.S.C. 717c, 717d. Because FERC's sales jurisdiction does not extend to retail sales of gas to ultimate consumers, see, *e.g.*, *Panhandle E. Pipeline Co.* v. *Public Serv. Comm'n of Ind.*, 332 U.S. 507, 516-517 (1947), the pricing and pass-through protections of NGPA Sections 601(b) and (c) also do not apply to such retail sales. Thus, Section 601 of the NGPA provides no support for federal allocation of overcharge refund amounts between the LDCs and their retail customers.

Petitioner also relies (Pet. 10-11) upon provisions of the NGPA that directed FERC to develop incremental-pricing surcharges in order to discourage use of natural gas as a boiler fuel, see NGPA §§ 201-205, 15 U.S.C. 3341-3345 (1982). Those provisions, which were repealed by the Act of May 21, 1987, Pub. L. No. 100-42, § 2, 101 Stat. 314, authorized FERC to require interstate pipelines to impose surcharges on gas delivered for use as boiler fuel, and required LDCs paying such surcharges to pass them through to boiler-fuel customers. See 15 U.S.C. 3344(c)(2)(B), 3345(a) (1982). Those boiler-fuel provisions, however, did not address the allocation of refunds for excessive charges that violated the NGPA price ceilings. Indeed, Congress's pre-

scription of detailed pass-through rules for federally required surcharges in the specific context of boiler fuel highlights the absence of any general requirement that FERC must require LDCs to pass through other charges or refunds to their customers.

2. Petitioner asserts (Pet. 12-13) that language in other D.C. Circuit decisions that addressed treatment of Kansas *ad valorem* taxes under the NGPA compels FERC to direct the LDCs to pass-on their refund distributions to retail consumers. In its decision in this case, however, the D.C. Circuit upheld FERC's determination (Pet. App. 31a) that petitioner is misreading the earlier cases. See *id.* at 34a-35a. The court of appeals' parsing of its own precedents does not warrant review by this Court. That is particularly true because the court of appeals has read its own decisions—none of which addressed the question of whether FERC must mandate pass-through of refunds to ultimate consumers —in a manner that is consistent with the States' well-established jurisdiction over retail sales of natural gas.[2]

3. Finally, petitioner contends (Pet. 14-15) that FERC's approval of the Williams settlement conflicts with this Court's decision in *New York* v. *FERC*, 122 S. Ct. 1012 (2002). In that case, the Court held that Section 201 of the Federal Power Act (FPA), 16 U.S.C. 824, authorizes FERC to exercise jurisdiction over the *transmission* in interstate commerce of electric energy that is sold at retail, when the transmission service is

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[2] Because petitioner misreads the court of appeals' earlier decisions, it is immaterial whether, as petitioner suggests (Pet. 14), Section 501(a) of the NGPA—which authorizes FERC to "perform any and all acts * * * as it may find necessary or appropriate to carry out its functions" under the NGPA, 15 U.S.C. 3411(a)—would give FERC the authority to implement petitioner's erroneous construction of those decisions.

"unbundled" from the State-regulated retail sale of energy and the retail customer has the ability to choose a preferred power supplier.[3] See 122 S. Ct. at 1022-1027. Far from suggesting that the FPA compels FERC to regulate all "retail energy transactions," as petitioner suggests (Pet. 14), the Court reaffirmed in *New York* that the FPA "limit[s] FERC's [jurisdiction over sales of electric energy] to that at wholesale" (122 S. Ct. at 1022), and therefore does not provide FERC with jurisdiction over retail sales of energy that are unbundled from interstate transmission service.

The Court itself drew an analogy in *New York* (122 S. Ct. at 1022-1023) to the jurisdictional rules of the NGA, as described in *Louisiana Power & Light*, *supra*. As noted above, those rules limit FERC's "sales" jurisdiction to sales of interstate gas for resale. See 406 U.S. at 636; see also *id.* at 639 ("Congress withheld *rate-setting* jurisdiction over direct sales [of gas]."). Thus, the reasoning and holding of *New York* are entirely consistent with the settled rule that FERC's sales jurisdiction does not authorize FERC to regulate LDCs' rates for their retail sales of gas. That settled rule defeats petitioner's claim that FERC was required to determine whether, and in what amount, LDCs must pass through overcharge refund distributions to their retail customers.

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[3] The Court did not decide whether the FPA allows FERC to exercise jurisdiction over retail transmission service that is sold together with electric energy in a single "bundled" transaction between a public utility and its retail customer, where the retail customer cannot choose a preferred power supplier. See 122 S. Ct. at 1028.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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